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TENGKU DATO' KAMAL IBNI SULTAN SIR ABU BAKAR & ORS

v.

BURSA MALAYSIA BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
HADHARIAH SYED ISMAIL JC
[JUDICIAL REVIEW NO: R1-25-270-2006]
18 JANUARY 2010

C

CIVIL PROCEDURE: *Action - Pending or current proceedings - Sub judice rule - Whether sub judice established - Decision by Listing Committee of Bursa Saham Kuala Lumpur that applicants had breached Listing Requirements - Whether real risk that decision will prejudice civil*
D *suit against applicants - Whether issues to be determined by court were totally different from issues before Listing Committee*

SECURITIES: *Securities Commission - Listing Committee - Powers, duties and discretion of - Decision by Listing Committee of Bursa Saham Kuala Lumpur that applicants had breached paras. 8.23(1) and 16.11(a)*
E *of Listing Requirements - Appeal against - Whether procedural defect in hearing - Whether applicants properly represented during hearing - Whether court to be slow in interfering with decision of Bursa*

SECURITIES: *Securities legislation - Listing Requirements - Breach of*
F *- Breach of paras. 8.23(1) and 16.11(a) of Listing Requirements - Allowing a listed company to lend or advance money to non-permitted persons - Matters to be investigated by Listing Committee - Appeal against - Whether procedural defect in hearing - Whether court to be slow in interfering with decision of Bursa*

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The applicants were the directors of Cepatwawasan (a public listed company). Another company, known as Prolific Yield Sdn Bhd ('Prolific Yield') was a wholly owned subsidiary of Cepatwawasan. The 1st and 2nd applicants were the only directors of Prolific Yield.
H On 1 July 2004, the 1st and 2nd applicants passed a Prolific Yield Directors' Circular Resolution to authorize Prolific Yield to enter into an agreement with Opti Temasek Sdn Bhd (Opti Temasek) *inter alia* for Opti Temasek to supply to Prolific Yield oil palm products. Prolific Yield also executed an agreement with Opti
I Temasek where Prolific Yield undertook to provide Opti Temasek loans from time to time. From 8 July 2004 to 13 July 2004, Prolific

Yield paid a total sum of RM13 million to Opti Temasek. On 5 August 2004, the applicants passed a directors' circular resolution of Cepatwawasan to approve Prolific Yield to advance RM3 million to one Sheikh Abdul Rahim. This sum of RM3 million was paid out. The applicants were later removed as directors of Cepatwawasan and Bursa Malaysia Securities Berhad (Bursa) issued notices to show cause to Cepatwawasan pursuant to para. 8.23 of the Listing Requirements (LR) and to all the applicants pursuant to para. 16.11 of the LR. Except for the 3rd applicant, the notices were received by the respective parties. The applicants did not reply to the notices to show cause. On 13 October 2005, the Listing Committee of Bursa decided that the applicants had breached para. 16.11(a) of the LR for causing Cepatwawasan to breach para. 8.23(1) of the LR and penalties were imposed on the applicants. Upon the applicants' application, Bursa's Appeal Committee considered the applicants' appeal in the presence of the applicants and their solicitors and dismissed the appeal. The applicants filed this action seeking an order for *certiorari* to quash the Appeal Committee's decision on the following grounds: (i) that the decision was *sub judice* due to pending civil court proceedings against the applicants; and (ii) that there was breach of natural justice.

Held (dismissing the applicants' application with cost):

(1) There was no real risk of prejudice to the civil suit against the applicants since the issues in Bursa's enforcement action were distinct and separate from the issues to be determined in the civil suit. Bursa's enforcement action related to payments made to persons who did not fall within the categories of permitted persons under para. 8.23(1)(i),(ii) and (iii) and para. 16.11 of the LR as well as whether the payments were necessary to facilitate the ordinary course of business of Prolific Yield. Whereas, the civil suit involved serious allegation of fraud, conspiracy to defraud and embezzlement. The issues to be determined by the court were totally different from the issues before the Bursa's Listing Committee. (paras 21 & 22)

(2) What the respondent did was merely determine to whom was the payment made and was the payment necessary to facilitate the ordinary course of business of Prolific Yield. That function was solely vested with the respondent and not the High Court. The respondent was not concerned with the motive, purpose or intention of the applicants in making the payments. (para 23)

A **(3)** Except for the 3rd applicant, the respondent had adduced sufficient proof of service of the notices to the applicants. It was the applicants who chose not to attend the hearing. Even if there was a procedural defect in the initial hearing in that no proper notice was given to the applicants, the applicants had a
B rehearing before the Appeal Committee. They were given an opportunity to be represented by counsel and put forth their case. (para 24)

(4) There was no allegation of bad faith on the part of Bursa
C Listing Committee and as such there was no reason for the court to interfere with its decision. The court should be slow to interfere with the decision of Bursa which has been vested with the power to decide freely, fearlessly and without a prospect of the correctness of their decision being investigated in protecting
D the public interest. (para 27)

Case(s) referred to:

Bursa Malaysia Securities v. Gan Boon Aun [2009] 5 CLJ 698 CA ***(refd)***

Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155 ***(refd)***

E *Kwikasair Industries Ltd v. Sydney Stock Exchange Limited BC 680002 [1968] ASLC 30* ***(refd)***

Loot Ting Yee v. Tan Sri Sheikh Hussain Sheikh Mohamed & Ors [1982] CLJ 66; [1982] CLJ (Rep) 203 FC ***(refd)***

Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd [2002] 4 CLJ 401 FC
F ***(refd)***

R v. International Stock Exchange of the UK and Ireland Ltd, ex-parte Else Ltd [1993] 1 QB 534 ***(refd)***

R v. Panel on Take Overs and Mergers, ex-parte Fayed and others [1992] BCLC 938 ***(refd)***

G **Legislation referred to:**

Capital Markets and Services Act 2007, s. 11

For the applicants - Dato' Sri Muhammad Shafee Abdullah (Lim Yin Yin with him); M/s Shafee & Co

For the respondent - Lim Chee Wee (Lee Shih with him); M/s Skrine & Co

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Reported by Amutha Suppayah

I

JUDGMENT

Hadhariah Syed Ismail JC:

[1] This is an application by the applicants for an order for *certiorari* to quash the decision of the Appeal Committee of Bursa Malaysia Securities Berhad (Bursa) dated 3 July 2006.

[2] Before I proceed to state the facts of the case, it is pertinent to first outline the duties and functions of Bursa.

[3] Bursa, as a stock exchange, has a statutory duty pursuant to s. 11 of the Capital Markets and Services Act 2007 to ensure an orderly and fair market in the securities that are traded through its facilities. To enable Bursa to discharge its statutory duty, various rules and requirements are issued, thereafter monitored and enforced by Bursa. One of such requirements is the Listing Requirements (LR). The purpose of LR is to set out the requirements that must be complied with by all applicants, listed issuer, management companies, trustees, their directors, officers or other persons to whom these LR are directed.

[4] The LR are based on the following principles:

(i) Directors of listed issuers shall maintain the highest standards of integrity, accountability, corporate governance and responsibility; and

(ii) Directors of listed issuers shall act in the interests of the company as a whole, particularly where the public represents only a minority of the shareholders or where directors or major shareholders have material interests in transactions entered into by listed issuers.

[5] For the purpose of this judicial review, the relevant LR are:

(1) Paragraph 8.23(1) which allows a listed company to lend or advance money only to the list of permitted persons as follows:

(i) directors or employees of the listed issuer or its subsidiaries, as the case may be, in such manner as may be permitted under the Companies Act 1965 or the relevant laws of the place of incorporation (as may be applicable);

A (ii) persons to whom the provision of financial assistance is necessary to facilitate the ordinary course of business of the listed issuer or its subsidiaries, as the case may be, such as the provision of advances to its sub-contractors; or

B (iii) the subsidiaries or associated companies of the listed issuer, the listed issuer (in the case of the subsidiaries providing the financial assistance) or its immediate holding company which is listed.

C (2) Paragraph 16.11 which stipulates that a director must not:

(a) cause, aid or abet a breach of the LR by such listed company; or

(b) permit, either knowingly or where he had reasonable means D of obtaining such knowledge, a listed company to commit a breach of the LR.

(3) Paragraph 16.17 which sets out the various penalties that may be imposed on the listed company and the directors for any breach of the LR.

E

Background Facts

[6] Cepatwawasan is a public listed company. The applicants were the directors of Cepatwawasan. Another company, known as Prolific F Yield Sdn Bhd is a wholly owned subsidiary of Cepatwawasan. The 1st and 2nd applicants were the only directors of Prolific Yield.

[7] On 1 July 2004, the 1st and 2nd applicants passed a Prolific Yield Directors' Circular Resolution to authorize Prolific Yield to G enter into an agreement with Opti Temasek Sdn Bhd (Opti Temasek) *inter alia* for Opti Temasek to supply to Prolific Yield fresh fruit bunches of oil palm products. Subsequent thereto, Prolific Yield executed an agreement dated 2 July 2004 with Opti Temasek where Prolific Yield undertake *inter alia* to provide to Opti Temasek H a loan or advance from time to time at Prolific Yield's sole and absolute discretion. The 1st and 2nd applicants, on behalf of Prolific Yield signed the agreement. From 8 July 2004 to 13 July 2004, Prolific Yield have paid a total sum of RM13 million to Opti Temasek.

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[8] On 5 August 2004, the applicants passed a directors circular resolution of Cepatwawasan to approve Prolific Yield to advance RM3 million to Sheikh Abdul Rahim bin Sheikh Hassan. This sum of RM3 million was paid out.

[9] On 8 June 2004 or thereabouts, the applicants were removed as directors of Cepatwawasan.

[10] On 12 July 2005, Bursa issued notices to show cause by way of AR registered post to Cepatwawasan pursuant to para. 8.23 of the Listing Requirements (LR) and to all the applicants pursuant to para. 16.11 of the LR. Except for the 3rd applicant, the notices were received by the respective parties.

[11] Cepatwawasan replied to the notice to show cause. But the applicants did not reply to the notices to show cause. In consequence, a copy of the Listing Committee Memo No. L91 of 2005 (the Memo) was sent out to the applicants by way of certificate of posting and AR registered post on 30 September 2005. Again, the applicants chose not to answer the memo. On 13 October 2005, the Listing Committee of Bursa decided that *inter alia*, the applicants had breached para 16.11(a) of the LR for causing Cepatwawasan to breach para. 8.23(1) of the LR. In consequence thereof, the following penalties were imposed on the applicants:

(i) RM1 million fine to be paid by the 1st and 2nd applicants and RM500,000 fine to be paid by the 3rd and 4th applicants to the respondent within 14 days from 3 July 2006;

(ii) Repayment of RM13 million that was paid to Opti Temasek for breaching para. 16.11 of the Listing Requirements for causing Cepatwawasan to breach para. 8.23(1) of the Listing Requirements, jointly and severally by the 1st and 2nd applicants within 30 days from 3 July 2006;

(iii) Repayment of RM3 million that was paid to Sheikh Abdul Rahim for breaching paras. 16.11(a) of the Listing Requirements for causing Cepatwawasan to breach para. 8.23(1) of the Listing Requirements, jointly and severally with the other applicants within 30 days from 3 July 2006.

[12] The Listing Committee's decision was communicated to Cepatwawasan and to the applicants through letters and press release, all dated 27 October 2005.

[13] On 11 November 2005, the applicants' solicitors wrote to Bursa for an extension of time for the applicants to appeal against the Listing Committee's decision. On 20 December 2005, the Appeal Committee decided to consider the applicants' appeal, notwithstanding the appeal was filed out of time. On 12 June 2006, the Appeals Committee heard the appeal from all the four applicants who were present with their solicitors. After considering the facts and circumstances of the case, the Appeals Committee dismissed the appeal by the applicants.

[14] The decision of the Bursa was challenged on two grounds:

1. The decision was *sub judice* due to pending civil court proceedings against the applicants; and

2. There has been a breach of natural justice.

Function Of Review Court

[15] There are a long line of authorities which state very clearly the underlying principles applicable in judicial review. I only need to refer to *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155, wherein at p 1173, Lord Brightman states:

> Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

[16] With the above principles as a guidance, I had to examine whether the grounds put forward by the applicants indeed justify this court to interfere with Bursa's decision.

First Ground

[17] Before I consider the *sub judice* issue, I need to state the approach taken by our court in dealing with the issue of *sub judice*. In *Bursa Malaysia Securities v. Gan Boon Aun* [2009] 5 CLJ 698; the case concerned the enforcement action taken by Bursa which was challenged as *sub judice* since there is a pending criminal proceedings against the applicant. The Court of Appeal rejected the argument

since the Court and Bursa's Listing Committee would not consider the same or identical issues in a manner that would affect the evaluation in the other. At p. 16, Heliliah JCA (now FCJ) held:

> Matters before the LC (Bursa's Listing Committee) relate to the issue of delay. The Court in the pending criminal proceedings based on the charge will consider essentials of what constitute "making misleading statements". The respondent has not shown that there is here a situation where a court and the LC would contemporaneously be considering the same identical issues in a manner that one would affect the evaluation in the other ... Neither is it shown that ultimately the decision in the LC would lead to a predetermination of the matters pending in the criminal trial. Neither prejudice nor the perversion of justice is indicated.

[18] In *R v. Panel on Take Overs and Mergers, ex parte Fayed and others* [1992] BCLC 938, the case concerned the disciplinary proceedings by the Panel on Take Over Mergers against the applicants. Neill LJ rejected the argument that the disciplinary proceedings would prejudice the civil proceedings brought against the applicants. At p. 947, it was held:

> It is clear that the court has power to intervene to prevent injustice where the continuation of one set of proceedings may prejudice the fairness of the trial of other proceedings. But it is a power which has to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice. Thus there may be cases where the publicity given to the result of a disciplinary hearing might have a possible influence on a jury in a criminal trial which was about to start. In the present case, however, the trial of the 1987 action will not take place until 1994 and it will be before a judge alone.

[19] The same approach was taken by our Federal Court in the case of *Loot Ting Yee v. Tan Sri Sheikh Hussain Sheikh Mohamed & Ors* [1982] CLJ 66; [1982] CLJ (Rep) 203.

[20] Reverting to this case, it is the applicants contention that since the judge of the High Court has yet to adjudicate on the alleged misappropriation of RM13 million and RM3 million based on testimonies of all the parties involved, this matter is *sub judice*. It is further submitted that having published the direction to the applicants to rectify Cepatwawasan in the press, the Bursa has interfered with the administration of justice, bordering on contempt. Learned counsel for the applicants relied on *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401.

[21] Learned counsel for the respondent on the other hand submit there is no real risk of prejudice of the ongoing civil suit against the applicants since the issues in Bursa's enforcement action are distinct and separate from the issues to be determined in the civil suit. It is the respondent's contention that the issues in Bursa's enforcement action relates to payments made to persons who did not fall within the categories of permitted persons under para. 8.23(1)(i), (ii) and (iii) and para. 16.11 of the LR. I am in full agreement with the respondent's contention. In the Bursa's enforcement action, the concern was whether the recipient of the money falls within the category of a permitted person to receive the money under the LR as well as whether the payments were necessary to facilitate the ordinary course of business of Prolific Yield Sdn Bhd. In deciding the payment was in fact breaching para. 8.23 and 11.6 of the LR, the Bursa has taken into consideration relevant facts ie, the nature of business of Prolific Yield had nothing to do with both the recipients of the money. Therefore, it is not correct for the applicants to say evidence from all the parties involved must first be put before the court in order to determine whether payments were made to a permitted person. Determination of strict compliance with the LR was vested with the Bursa. Therefore only the Bursa Listing Committee had the right to determine whether the applicants had in fact breached the LR.

[22] Whereas the civil suit involves serious allegation of fraud, conspiracy to defraud and embezzlement. The issues to be determined by the court are totally different from the issues before the Bursa's Listing Committee. Some of the issues was rightly listed out by learned counsel for the respondent as follows:

(i) Whether the applicants had used Opti Temasek in order to enter into a sham Contract to Supply with Prolific Yield.

(ii) Whether Opti Temasek is a device to defraud.

(iii) Whether the applicants had used the sham Contract to Supply as a device to extract, embezzle and fraudulently siphon RM13 million from Cepatwawasan and Prolific Yield.

(iv) Whether the applicants had conspired with Sheikh Abdul Rahman to embezzle and commit fraud against Cepatwawasan and Prolific Yield.

[23] In short, the applicants cannot deny that payments were made to Opti Temasek and Sheikh Abdul Rahman, whether the case was heard by the High Court first or not. What the respondent in this case did was merely determining "to whom was the payment made" and "was the payment necessary to facilitate the ordinary course of business of Prolific Yield". That function is solely vested with the respondent and not the High Court. The respondent is not concerned with the motive, purpose or intention of the applicants in making the payments. The task of determining the intention of the parties and whether there was fraud involved is left to the High Court to decide. That is when witnesses had to be called. At the respondent's level, to determine whether the recipients of the monies fall within the category or class of persons authorized to receive payments, the respondent only need to consider the nature of business of Prolific Yield. There was no necessity at all to call witnesses. The distinct and separate issues yet to be decided by the High Court and the issues that have been decided by the respondent are so obvious. That explained why in their affidavit in support of this application, the applicants did not demonstrate how the findings made by Bursa's Listing Committee would affect or interfere with the trial of the civil suit. The applicants' contention on the first ground must therefore fail.

Second Ground

[24] The complaint of the applicants was they did not attend the initial hearing before the Listing Committee and only had an opportunity to be heard before the Appeal Committee. In this case, except the 3rd applicant, the respondent has adduced sufficient proof of service of the notices to the applicants. It was the applicants who chose not to attend the hearing. Even if there was a procedural defect in the initial hearing in that no proper notice was given to the applicants, I agree with the respondent's submission that the applicants had a rehearing before the Appeal Committee. The applicants cannot deny that at the appeal stage, they were present with their solicitors and had made oral and written representations to the Appeal Committee. In other words, they were given an opportunity to be represented by counsel and put forth their case. In those circumstances, there is no merit in the applicants contention that they were not given an opportunity to be heard. This second ground must also fail.

Acts In Good Faith

[25] The Stock Exchange having been vested with the power to ensure its rules and regulations are complied with by its members had an unfettered discretion in the exercising of its power. But if in exercising the discretionary power, there appears to be lacking in good faith, interference by the court is warranted. However, case analysis indicated courts are slow in interfering with the decision of the Stock Exchange. In *Kwikasair Industries Ltd v. Sydney Stock Exchange Limited* BC680002 [1968] CCH ASLC 30, 701, the stock exchange suspended the quotation of the stock of the plaintiff's company as the exchange committee was of the view that the company's activities were not carried out according to the spirit of the rules of the stock exchange. The stock exchange argued that the relationship between the two parties was contractual and that the company had no right to compel or restrain the committee from entering or retaining a company's security of the stock exchange because it would be useless to specifically enforce an immediately terminable agreement. The contract was immediately terminable as the listing of the company was at the pleasure of the exchange. The court refused to overturn the decision of the exchange. Street J held:

> The stock exchange is not only entitled but it is bound to be vitally concerned with the maintaining of fair market for the buying and selling of securities ... Paramount and predominant amongst all (of its) objects is to promote and protect the interests of all members of the public having dealings on The Sydney Stock Exchange or with members of The Sydney Stock Exchange Limited.
>
> ... so long as the stock exchange continues in this community to discharge with the acquiescence of the legislature, the important public duty expressed in its paramount and predominant object (cl. 6), the members of its committee should be left free to exercise honestly their powers of entry on or removal from the official list unencumbered by any prospect of their having to face alitigious investigation of the correctness of their decision. The powers of the committee in this regard are arbitrary; they are intended to be exercised summarily and fearlessly in protecting the public interest.

[26] In *R v. International Stock Exchange of the UK and Ireland Ltd, exparte Else Ltd* [1993] 1 QB 534, at p. 552, Lord Bingham states:

> The courts will not second guess the informed judgment of responsible regulators steeped in knowledge of their particular market.

[27] In the case before the court, there was no allegation of bad faith on the part of Bursa Listing Committee. There can never be such an allegation because the Listing Committee only acted to protect the public interest. Apart from that, the Bursa Listing Committee in coming to their decision had addressed their mind to the correct issues and had taken into consideration relevant facts. It therefore follows there was no reason whatsoever for this court to interfere with the decision of the Listing Committee. The court should be slow to interfere with the decision of Bursa which had been vested with the power to decide freely, fearlessly and without a prospect of the correctness of their decision being investigated in protecting the public interest.

[28] For the reason stated above, the applicants' application in encl. 1 is dismissed with cost.